No. 2527.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUNG QUEY, alias SAM KEE, LI CHEUNG, MON HING and JT YEE,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

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STATEMENT.

The statement of facts in the brief of Plaintiff in Error is sufficient for the purposes of this case, we believe, and we will pass directly to the law points involved.

SUFFICIENCY OF COUNT TWO OF INDICTMENT.

First, it is contended that no overt act is alleged against defendant, Jung Quey, the overt acts pleaded being by other defendants. Of course, the very definition of a conspiracy necessarily renders argument on this point unnecessary. Section 37 of the Penal Code reads as follows:

> "Section 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years, or both."

It will be seen that the statute in terms permits the overt act "of one or more" of the parties to be sufficient for the guilt of all.

"In a conspiracy, every act of one of the conspirators in furtherance of a common design, is in contemplation of law, the act of all."

3 Encyc. U. S. Rep. 1102, citing cases.

"The gist of the offense is still the unlawful combination, which must be proven against all the members of the conspiracy, each one of whom is then held responsible for the acts of all."

American Fur Co. vs. U. S., 2 Pet. 358, 7 L. Ed. 450;

Bannon vs. U. S., 156 U. S. 464, 468, 39 L. Ed. 494.

The objection that, in charging the overt acts, the words "knowingly or fraudulently" do not appear, seems hypercritical for the reason that these words appear in the conspiracy charge, and it is alleged that "the overt acts were done in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof." If done in furtherance of a conspiracy unlawfully, wilfully, knowingly, wickedly,

corruptly and feloniously entered into, how could the overt act be otherwise than "knowingly or fraudulently done?" The overt act, of course, need not be a crime or within itself an unlawful or forbidden act. The overt act is simply to impart vitality to the conspiracy and bring it within the condemnation of the statute.

Again it is urged that the means by which the conspiracy was to be accomplished is not alleged. Counsel omits well-defined distinctions in making this claim. The true rule in this behalf is

> "When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in an agreement to accomplish a purpose not in itself *criminal* or *unlawful* by criminal or unlawful means, the means must be set out."
>
> 3 Ency. U. S. Repts. 1104, citing
> Pettibone vs. U. S., 148 U. S. 197, 37 L. Ed. 419;
> Dealy vs. U. S., 152 U. S. 539, 38 L. Ed. 545.

Now, Section 1 of the Opium Act, as amended by the Act of January 17th, 1914, is as follows:

> "That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; PROVIDED, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law."

From this it will easily be seen that receiving and concealing unlawfully imported smoking opium is absolutely forbidden under any and all circumstances and for any and all purposes. Now, why the necessity of alleging "means" by which it was to be carried out? There can be no lawful concealment. The "means" then becomes a false quantity so long as the purpose to conceal exists and is pleaded.

Next, it is contended that the use of the words "contrary to law" in count two of the indictment (Tr. p. 6) renders the said count fatally defective.

The count charges in apt language a conspiracy, feloniously entered into, to knowingly receive and conceal fourteen pounds of smoking opium, "which as they (the defendants) then and there knew, had been imported contrary to law."

We submit that when grammatically analyzed the words quoted mean that the opium had been as a fact imported contrary to law, as the defendants then and there well knew. In other words, the unlawful importation is pleaded as a fact, and the defendants' knowledge thereof is likewise pleaded, and the two elements make the crime condemned by the statute. In other words, counsel omits to give due regard to the punctuation of phrases referred to.

Now, inasmuch as the Act, in section one thereof, does, as above stated, condemn *all* importations of smoking opium, there can be no need of showing any facts other than mere importation to show an act "contrary to law."

The case of Keck vs. United States, 172 U. S. 434,

cited by counsel is in fact against the contention urged by counsel, and distinguishes between that case and the case at bar by the use of this language:

> "The generic expression 'import and bring into the United States' did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements."

Now, if the importation is *per se* contrary to law, is not the inference clear that no allegations showing how or why it became contrary to law are necessary?

Next, counsel say that the indictment does not charge a conspiracy within the jurisdiction of the District Court for the Northern District of California. The indictment does allege a conspiracy formed in the Northern District of California to receive and conceal opium unlawfully imported into the United States. Now this is sufficient. The conspiracy is the crime to be punished. It certainly should be punished in the district of its formation.

> "If a conspiracy be entered into within the jurisdiction of a court a subsequent overt act may be done anywhere without affecting the jurisdiction."
>
> 3 Ency. U. S. Rep. 1103, citing
> Dealy vs. United States, 152 U. S. 539;
> Hyde vs. Shine, 199 U. S. 62.

> "It has been decided that if the conspiracy be entered into within the jurisdiction of the trial court, the indictment will lie there though the overt act is shown to have been committed in another jurisdiction, or even in a foreign country."
>
> Dealy vs. United States, supra;
> In re Palliser, 136 U. S. 257.

Counsel's contention that a conspiracy in the Northern District of California to receive at a point in Mexico smoking opium that they knew had been unlawfully imported and was still in the United States would not be a crime, seems, to say the least, doubtful.

But the indictment when fairly read and construed could not be held to admit of such a construction. It is a crime against the law of the United States we are trying to charge, and the language that defendants, in the jurisdiction of the court, were conspiring to conceal opium already in the United States in violation of law, means a conspiracy to be executed in the United States.

Counsel argues that the first overt act alleged could not be in furtherance of a conspiracy, and that the second and third are inconsistent with the fourth. It is nowhere argued that the evidence did not support the overt acts alleged. Consequently, inconsistencies, if admitted, would not vitiate the indictment.

THE ACT NOT UNCONSTITUTIONAL.

Both this Court and the Supreme Court have, since the filing of counsel's brief, held the Act in question to be constitutional, and further discussion of this point is superfluous.

Steinfelt vs. United States;
Brolan et al vs. United States.

EMPANELMENT OF JURY.

On this, the second trial of defendants, four jurors who had in the former trial been peremptorily challenged

by defendants, were again in the box and were drawn on the first twelve called in the box. Three were peremptorily challenged. The fourth was immediately, and while the defendants yet had six challenges, sworn as a juror. Jurors possessing the qualifications required are subject to challenge for cause only upon a showing of express or implied bias. The legal bias referred to is defined in California by statute. See Penal Code, Secs. 1073-4.

Because a juror has been challenged peremptorily does not *per se* create a state of mind prejudicial to defendant. On the contrary, the presumption would be against such a conclusion. Likewise the qualification as against a challenge for cause is to be tried by the judge and except for an abuse of discretion no reversal would be warranted.

Cal. Penal Code, 1061-2, 1077-8, 1083;
Judicial Code, Sec. 287;
Missouri, K. & T. R. Co. vs. Elliott, 102 Fed. 96.

No showing is made that the juror referred to was either biased or in any way other than a fair and impartial individual.

SPECIAL AND GENERAL VERDICTS NOT INCONSISTENT.

The jury rendered the following verdicts:

> "We, the Jury, find Jung Quey, Li Cheung, Mon Hing and Jt Yee, the defendants at bar, guilty on the second count of the Indictment herein. John G. Barker, Foreman."

"We, the Jury, find for the defendants at the bar upon their pleas of former acquittal of the offenses charged in the first count of the Indictment. John G. Barker, Foreman."

"We, the Jury, find for each of the defendants at the bar upon his pleas of former acquittal of conspiracy with Yok Fat alone. John G. Barker, Foreman."

The special verdict acquitting of conspiracy with Yok Fat alone does not mean that the defendants did not conspire together or with unknown persons. No inconsistency appears, and in our judgment this is self-evident.

RULINGS OF ADMISSION OF EVIDENCE.

Statements of one of the conspirators, showing this attitude or bent of mind, is competent.

Greene vs. United States, 146 Fed. 784.

It is competent on the cross-examination of a witness giving the defendant a good character to ask such questions as will legitimately test the value of the evidence given.

"In People vs. Gordon, 103 Cal. 573, it is said that a witness 'having testified as to the defendant's general good character, his opinion and the value of it may be tested by asking the witness, on cross-examination, whether he has ever heard that the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him.' And in People vs. Mayes, 113 Cal. 624, it is said: 'While it is not permissible to give evidence of wrongful acts for the purpose of impeaching the witness, it is proper upon cross-examination of a witness who has given testimony,

either for sustaining or impeaching the credibility of another witness, to question him with reference to his knowledge of specific acts, and with reference to the specific acts themselves, for the purpose of overcoming the effect of his testimony upon the direct examination.' ''

People vs. Perry, 144 Cal. 750.

INSTRUCTIONS.

Counsel's brief, page 20, sets out an instruction embodying a certain doctrine opposed to the law touching decoy transactions. This instruction was properly refused.

> ''When a person, or those officers of the law who are charged with its enforcement, have reason to believe that a crime is about to be committed or attempted, there is nothing legally or morally wrong in laying a trap, setting out a decoy, or placing a detective in observation, or in entering into a conspiracy with others to detect and punish the offenders; and the waylaying and watching to detect the commission of crime by the prosecutor or witnesses, in order to obtain evidence with which to convict, will not constitute a defense in a prosecution for the commission of the crime or offense.''

Wharton's Crim. Law (Vol. I, 11th Ed.), Sec. 190, p. 229, citing

Grimm vs. United States, 156 U. S. 604, 39 L. Ed. 550;

Andrews vs. United States, 162 U. S. 420, 40 L. Ed. 1023; and many others.

The second instruction complained of (Counsel's

brief, p. 21) was properly refused because in this case, as we have heretofore argued, the purpose was *per se* a violation of law whatever means might have been used, and this renders the means a negligible quantity in the case.

FAILURE TO OFFER CERTAIN OPIUM IN EVIDENCE.

It was not necessary to our case to prove that the seven skins of opium found near the scene of arrest was the actual opium smuggled ashore. Plenty of evidence aside from this existed upon which a conviction could be supported.

The identification not being absolutely complete and the evidence being cumulative only, no necessity appeared for offering anything in evidence except the suitcase and rags that were properly identified. That opium was in the possession of Li Cheung and delivered to defendants, Mon Hing and Jt Yee, is certain and without serious contradiction.

CONCLUSION.

We believe the record free from error and submit that judgment ought to be affirmed.

Respectfully submitted,

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